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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 661

FORREST PARROTT, DONALD PARROTT, and
BOND AND SHARE CORPORATION,
Petitioners,

VERSUS

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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December, 1963.

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SUBJECT INDEX

	PAGE
I. Statement of Jurisdiction	1
II. Statement of Questions Presented for Review	2
III. Statement of Constitutional Provisions, Statutes, Regulations and Federal Rules of Civil Procedure Involved	3
IV. Statement of Case	7
V. Reasons Relied On for the Allowance of the Writ	9
Conclusion	10

AUTHORITIES

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment V	3

STATUTES:

5 U.S.C. 1004(a)	5
15 U.S.C. 78o	4
15 U.S.C. 78u (b)	4
15 U.S.C. 78u (c)	4-5, 7
28 U.S.C.A. 286	6
28 U.S.C.A. 361	6
28 U.S.C.A. 405	6
28 U.S.C., Sec. 2101(c)	2
Administrative Procedural Act, Sec. 5(a)	5
Securities Exchange Act of 1934, Sec. 15	4
Securities Exchange Act of 1934, Sec. 21(b)	4
Securities Exchange Act of 1934, Sec. 21(c)	4-5, 7

INDEX CONTINUED PAGE

MISCELLANEOUS:

Federal Rules of Civil Procedure for the District Court of the United States, Rule 26 6

Federal Rules of Civil Procedure, Rules 30, 31 6

Rules of the Supreme Court, Rule 19(1)(b) 2

Securities and Exchange Commission Rules of Practice, Rule IX(b) 5-6

17 C.F.R. 201.9(b) 5-6

APPENDIX

Pertinent Texts of Statutes and Federal Rules of Civil Procedure referred to in Section III of Petition i

Section 15, Securities Exchange Act of 1934, 15 U.S.C. 78o ..... i-vi

Federal Rules of Civil Procedure, Rule 26, 28 U.S. C.A. 266, Depositions Pending Action ..... vi-viii

Federal Rules of Civil Procedure, Rule 30, 28 U.S. C.A. 361, Depositions Upon Oral Examination ..... viii-xii

Federal Rules of Civil Procedure, Rule 31, 28 U.S. C.A. 405, Depositions of Witnesses Upon Written Interrogatories ..... xii-xiii

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Earl Warren, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

I.

STATEMENT OF JURISDICTION

(1) The United States Court of Appeals for the Tenth Circuit, on October 4, 1963, ordered Cause No. 7357, *Securities and Exchange Commission* v. *Forrest Parrott, et al.*, remanded to the United States District Court with directions to enforce certain subpoenas, which was the subject of the review in the Circuit Court at that time. No opinion was written.

(2) Mandate was issued October 7, 1963, and recalled November 8, 1963; together with order staying the mandate for thirty (30) days to allow the seeking of review by petition for writ of certiorari.

(3) The jurisdiction of the Supreme Court of the United States is invoked under provisions of Title 28, United States Code, Section 2101(c) and Rule 19(1)(b) of the United States Supreme Court.

II.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

(1) Can a subpoena (either *ad testificandum or duces tecum*) issued on a witness (not a formal party) in an administrative proceeding before the Securities and Exchange Commission be enforced through an enforcement action brought by the Securities and Exchange Commission in the United States District Court so as to require the witness to appear in the administrative hearing without certain rights of due process of law by not being a formal party to the administrative hearing when the same individual is a party defendant in an injunctive action brought prior to the administrative hearing in the same United States District Court by the Securities and Exchange Commission, and that individual's testimony in both proceedings (the injunctive judicial case and the administrative proceeding) would involve the same subject matter (same stock issues, sales and transfers), and when discovery procedures are available to the Securities and Exchange Commission in the judicial action under the Federal Rules of Civil Procedure, where the individual would have all of

his rights of due process protected by reason of his status as a formal party defendant in the judicial proceedings?

(2) Can the Securities and Exchange Commission, in an administrative proceeding filed subsequent to an injunctive judicial proceeding through the mechanics of a subpoena issued in the administrative hearing, require the testimony of a party defendant in the judicial case prior to the presentment to the trial court its injunctive case, where the witness does not have all of his privileges secured to him in the administrative proceeding by not being a formal party, and the subject matter of the inquiry at the administrative hearing will be determinative of the testimony of the party defendant at the judicial hearing, thereby resulting in an advantage to the Securities and Exchange Commission and a disadvantage to the party defendant, thus allowing the Securities and Exchange Commission to secure for its use, either in the judicial trial or preparation for the judicial trial, testimony and evidence outside the discovery process of the Rules of Civil Procedure, and outside the rights of due process of law allowed the party defendant in the judicial case?

III.

STATEMENT OF CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

The constitutional provisions, statutes and regulations involved are:

(1) Amendment V to the Constitution of the United States as relates to due process of law:

"* * * nor be deprived of life, liberty, or property, without due process of law; * * *" (U.S.C.A. Const. Amend. V, Due Process of Law Clause at page 482).

(2) The Securities Exchange Act of 1934 as relating to the following:

(a) Section 15, 15 U.S.C. 78o;
(Pertinent text at page i and following of App.)

(b) Section 21(b), 15 U.S.C. 78u (b):

"For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records, which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing."

(c) Section 21(c), 15 U.S.C. 78u (c):

"In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda,

and other records. Any such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both."

(d) The Administrative Procedural Act, Section 5(a), 5 U.S.C. 1004(a)—Pertinent text as relates to problems here involved:

"* * * In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives."

(e) Rule IX(b) of the Securities and Exchange Commission Rules of Practice, 17 C.F.R. 201.9 (b):

"Parties in Broker-Dealer Proceedings. In proceedings under Sections 15(b), 15A(1) (2) or 19(a)(3) of the Securities Exchange Act

of 1934, any person associated with a member of a national securities association, a member of a national securities exchange, a broker or a dealer, whose interests may be affected by the proceedings, shall be entitled to participate as a party. If he participates generally in the proceedings or files a notice of appearance, he shall be deemed a party of record and will be given notices of intermediate developments in the proceedings. In any event he may inform himself of such developments by attendance at the hearings or examination of the record (whether the proceedings be public or private) or by arrangement with a party of record so that he can determine whether he desires to be heard at any time. The term 'person associated' as used in this rule shall mean a person associated with a member, broker or dealer in any of the capacities specified in Sections 15(b) and 15A(b) (4) of the Securities Exchange Act of 1934."

(f) Federal Rules of Civil Procedure for the District Court of the United States:

Rule 26—Depositions Pending Action; 28 U.S.C.A. 286; (Pertinent text at page iv and following of App.)

Rule 30—Depositions Upon Oral Examination; 28 U.S.C.A. 361; (Pertinent text at page vi and following of App.)

Rule 31—Depositions of Witnesses Upon Written Interrogatories; 28 U.S.C.A. 405; (Pertinent text at page viii and following of App.)

IV.

STATEMENT OF CASE

The Securities and Exchange Commission brought administrative proceedings to revoke registration of Raleigh Securities Company and to make other incidental determinations. This was commenced July 2, 1962. Forrest Parrott was alleged to have caused the suggested violations by Raleigh Securities Company of the Securities Act. Parrott did not become a formal party under the procedural rules of the Securities Commission.

In this administrative proceeding, on August 8, 1962, two subpoenas were issued by the trial examiner. A subpoena *ad testificandum* was directed to Forrest Parrott, and a subpoena *duces tecum* was directed to Don Parrott as President of Bond and Share Corporation. Neither Forrest Parrott nor Don Parrott responded to the subpoenas by appearing at the administrative hearing at Washington, D. C., as required by the writs.

The Securities and Exchange Commission brought an action for enforcement of the two subpoenas in the United States District Court of Colorado on September 20, 1962, as authorized by Section 21(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(c). This is the basis for federal jurisdiction in the court of first instance, from which the present petition for review stems.

The court in its order of December 11, 1962, conditionally enforced the subpoenas by refusing to require the witnesses so subpoenaed to testify in the administrative hearing in Washington, D. C., for a period of ninety (90) days. During that protective period of time, the subpoenaed witnesses would be required to answer oral or written inter-

rogatories in Denver, Colorado. The ninety day period of time was extended by the trial court from time to time, with the last order extending time being dated April 24, 1963, delaying unlimited enforcement of subpoenas until July 25, 1963. It was the order of April 24, 1963, which the Securities and Exchange Commission appealed to the Tenth Circuit of the United States Court of Appeals. On October 7, 1963, the Appeals Court ordered the subpoenas enforced. It is for a review of this enforcement order a writ of certiorari is sought.

Prior to the Commission's institution of Raleigh administrative proceedings, the Commission had brought two separate actions in the United States District Courts to enjoin the unlawful sale and distribution of securities alleged in the administrative proceeding to have been unlawfully distributed and sold by Raleigh. One was filed in December 1961 in the United States Court in the Western District of Oklahoma, wherein these petitioners were party defendants, and involved the stock of Hydromotive Corporation. Another action was brought by the Securities and Exchange Commission in the United States District Court of Colorado in March 1962. This action involved the stock of Ampet Corporation and Petron Corporation. These petitioners are also defendants in that suit.

In each case, a temporary restraining order was entered with respect to the stock involved, barring further sales in violation of the registration and anti-fraud provisions of the Securities Act of 1933. These orders have been continued in effect by consent of all the parties. The Oklahoma action has been heard but formal decision has

not been entered. There has been no trial as yet in the Colorado action.

V.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The problems here involved raise an important question of federal law which has not been, but should be settled by this Supreme Court. The enforcement of the subpoenas here involved raises a real question of fair play sufficiently serious to result in a denial of due process of law. Enforcement of administrative subpoenas prior to discovery procedure or trial in the judicial hearings places the individual involved at a disadvantage at the hands of administrative agency. The effect of enforcing the subpoenas in the administrative hearing at this time and outside the sphere of the Federal Rules of Civil Procedure allows the administrative agency to complete its discovery process for any use which it might desire in its preparation or presentment of the injunctive judicial hearing. This unique feature shocks the fundamental right of fair play which is an essential part of due process of law. Judicial procedures are to secure truth and justice and not for adversaries to vie for advantage over each other. This was the very philosophy and judicial theory of the Federal Rules of Civil Procedure. Why allow a government administrative agency under the guise of an administrative hearing to take advantage of an individual citizen when the administrative governmental agency can secure the same information by actual discovery process in the injunctive judicial case under the ground rules of the Federal Rules of Civil Procedure and

the due process of law to which the individual is entitled as an actual party defendant in the judicial hearing?

WHEREFORE, your petitioners pray a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit be granted and ordered to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of said Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem just and proper.

Dated this 4th day of December, 1963.

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Counsel for Petitioners.

Of Counsel:

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December, 1963.

APPENDIX

(Pertinent Texts of Statutes and Federal Rules of Civil Procedure referred to in Section III of Petition)

SECTION 15, SECURITIES EXCHANGE ACT OF 1934, 15 U.S.C. 78o:

(a) No broker or dealer (other than one whose business is exclusively intrastate) shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than an unexempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, unless such broker or dealer is registered in accordance with subsection (b) of this section.

(b) A broker or dealer may be registered for the purposes of this section by filing with the Commission an application for registration, which shall contain such information in such detail as to such broker or dealer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such broker or dealer, as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors. Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission or within such shorter period of time as the Commission may determine.

An application for registration of a broker or dealer to be formed or organized may be made by a broker or dealer to which the broker or dealer to be formed or organized is to be the successor. Such application shall contain such information in such detail as to the applicant and as to the successor and any person directly or indirectly con-

trolling or controlled by, or under direct or indirect common control with, the applicant or the successor, as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors. Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission or within such shorter period of time as the Commission may determine. Such registration shall terminate on the forty-fifth day after the effective date thereof, unless prior thereto the successor shall, in accordance with such rules and regulations as the Commission may prescribe, adopt such application as its own.

If any amendment to any application for registration pursuant to this subsection is filed prior to the effective date thereof, such amendment shall be deemed to have been filed simultaneously with and as part of such application; except that the Commission may, if it appears necessary or appropriate in the public interest or for the protection of investors, defer the effective date of any such registration as thus amended until the thirtieth day after the filing of such amendment.

The Commission shall, after appropriate notice and opportunity for hearing, by order deny registration to or revoke the registration of any broker or dealer if it finds that such denial or revocation is in the public interest and that (1) such broker or dealer whether prior or subsequent to becoming such, or (2) any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), or any person directly or indirectly controlling or controlled by such broker or dealer, whether prior or subsequent to becoming such, (A) has willfully made or caused to be made in any application for registration pursuant to this subsection or in any document supplemental thereto or in any proceeding before the Commission with respect to

registration pursuant to this subsection any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact; or (B) has been convicted within ten years preceding the filing of any such application or at any time thereafter of any felony or misdemeanor involving the purchase or sale of any security or arising out of the conduct of the business of a broker or dealer; or (C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security; or (D) has willfully violated any provision of the Securities Act of 1933, or of this chapter, or of any rule or regulation thereunder. Pending final determination whether any such registration shall be denied, the Commission may by order postpone the effective date of such registration for a period not to exceed fifteen days, but if, after appropriate notice and opportunity for hearing, it shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors to postpone the effective date of such registration until final determination, the Commission shall so order. Pending final determination whether any such registration shall be revoked, the Commission shall by order suspend such registration if, after appropriate notice and opportunity for hearing, such suspension shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors. Any registered broker or dealer may, upon such terms and conditions as the Commission may deem necessary in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any registered broker or dealer, or any broker or dealer for whom an application for registration is pending, is no longer in existence or has ceased to do business as a broker or dealer, the Commission shall

by order cancel the registration or application of such broker or dealer.

(c) (1) No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of any manipulative, deceptive; or other fraudulent device or contrivance. The Commission shall, for the purposes of this subsection, by rules and regulations define such devices or contrivances as are manipulative, deceptive, or otherwise fraudulent.

(2) No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation. The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious.

(3) No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection

of investors to provide safeguards with respect to the financial responsibility of brokers and dealers.

(d) Each registration statement hereafter filed pursuant to the Securities Act of 1933, shall contain an undertaking by the issuer of the issue of securities to which the registration statement relates to file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 78m of this title in respect of a security listed and registered on a national securities exchange; but such undertaking shall become operative only if the aggregate offering price of such issue of securities, plus the aggregate value of all other securities of such issuer of the same class (as hereinafter defined) outstanding, computed upon the basis of such offering price, amounts to $2,000,000 or more. The issuer shall file such supplementary and periodic information, documents, and reports pursuant to such undertaking, except that the duty to file shall be automatically suspended if and so long as (1) such issue of securities is listed and registered on a national securities exchange, or (2) by reason of the listing and registration of any other security of such issuer on a national securities exchange, such issuer is required to file pursuant to section 78m of this title information, documents, and reports substantially equivalent to such as would be required if such issue of securities were listed and registered on a national securities exchange, or (3) the aggregate value of all outstanding securities of the class to which such issue belongs is reduced to less than $1,000,000, computed upon the basis of the offering price of the last issue of securities of said class offered to the public. For the purposes of this subsection, the term "class" shall be construed to include all securities of an issuer which are of substantially similar character and the holders of which

enjoy substantially similar rights and privileges. Nothing in this subsection shall apply to securities issued by a foreign government or political subdivision thereof or to any other security which the Commission may by rules and regulations exempt as not comprehended within the purposes of this subsection.

FEDERAL RULES OF CIVIL PROCEDURE, RULE 26, 28 U.S.C.A. 286
DEPOSITIONS PENDING ACTION:

(a) When Depositions May be Taken. By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.

(c) Examination and Cross-Examination. Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 43(b).

(d) Use of Depositions. A the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(e) Objections to Admissibility. Subject to the provisions of Rule 32(c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(f) Effect of Taking or Using Depositions. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

FEDERAL RULES OF CIVIL PROCEDURE, RULE 30, 28 U.S.C.A. 361
DEPOSITIONS UPON ORAL EXAMINATION:

(a) Notice of Examination: Time and Place. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion

of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time.

(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

(c) Record of Examination; Oath; Objections. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination,

parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign

together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32(d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Filing by Officer; Copies; Notice of Filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the Court in which the action is pending or send it by registered mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such

other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

FEDERAL RULES OF CIVIL PROCEDURE, RULE 31, 28 U.S.C.A. 405
DEPOSITIONS OF WITNESSES UPON WRITTEN INTERROGATORIES.

(a) Serving Interrogatories; Notice. A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within 5 days thereafter the latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within 3 days after being served with redirect interrogatories, a party may serve recross interrogatories upon the party proposing to take the deposition.

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30 (c), (e), and (f), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

(c) Notice of Filing. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(d) Orders for the Protection of Parties and Deponents. After the service of interrogatories and prior to the taking of the testimony of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent, upon notice and good cause shown, may make

any order specified in Rule 30 which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination.

ORDER AND DECREE SOUGHT TO BE REVIEWED

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH JUDICIAL CIRCUIT SITTING AT DENVER, COLORADO

TWENTIETH DAY, SEPTEMBER TERM, FRIDAY, OCTOBER 4th, 1963.

PRESENT: Honorable Alfred P. Murrah, Chief Judge,
Honorable Orie L. Phillips, Circuit Judge,
Honorable Jean S. Breitenstein, Circuit Judge,
Honorable Delmas C. Hill, Circuit Judge,
Honorable Oliver Seth, Circuit Judge,
And other officers as noted on the 9th day of September, 1963.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Delmas C. Hill, Circuit Judge.

Securities and Exchange Commission, Appellant, vs. Alfred O. Brehmer et al., Appellees.	Appeals from the United States District Court for the District of Colorado.
Securities and Exchange Commission, Appellant, vs. Forrest Parrott et al., Appellees.	

7356

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[APPENDIX]

These causes came on to be heard on the transcript of the record from the United States District Court for the District of Colorado, and were argued by counsel.

On consideration whereof, it is now here ordered that these causes be remanded to the United States District Court for the District of Colorado with direction to enforce the subpoenas.

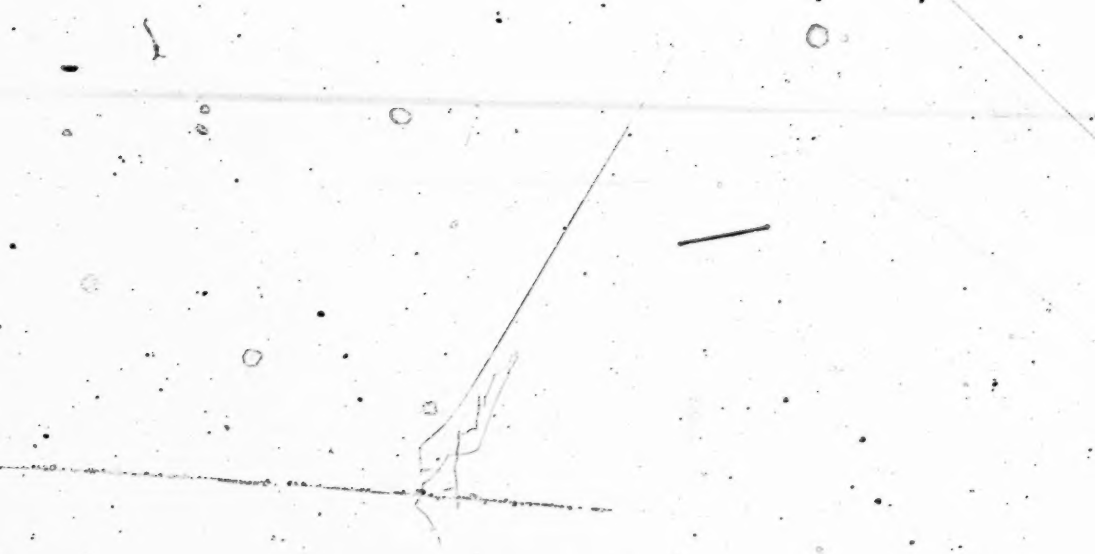
It is further ordered that the mandate issue forthwith.

A true copy as of record,

TESTE:

ROBERT B. CARTWRIGHT, CLERK

By George A. Pease
Chief Deputy Clerk



In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 661

FORREST PARROTT, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

Neither the court of appeals nor the district court rendered any opinion.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1963 (Pet. App. xv, xvi). The petition for a writ of certiorari was filed on December 6, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 2101(*c*) and Rule 19(1)(b) of this Court. It should properly be invoked under 28 U.S.C. 1254(1).

716-880—64

QUESTION PRESENTED

Whether the court of appeals properly directed immediate compliance with subpoenas issued by a hearing examiner of the Securities and Exchange Commission requiring petitioners' appearance as witnesses in an administrative proceeding, where the only basis for delay was that petitioners were defendants in injunction actions instituted against them by the Commission.

STATUTES AND RULES INVOLVED

The pertinent statutes and rules are set forth in the petition at pages 3–6 and in the appendix thereto at pages i–xiii.

STATEMENT

On July 2, 1962, the Securities and Exchange Commission instituted an administrative proceeding under Sections 15(b) and 15A of the Securities Exchange Act of 1934, 15 U.S.C. 78o and 78o–3, to determine, *inter alia*, whether to revoke the registration of W. Allen Raleigh, d/b/a Raleigh Securities Company, a broker and dealer, because of certain alleged violations of the Securities Act of 1933 in connection with his sale and distribution of securities of three corporations: Hydramotive Corporation, Ampet Corporation and Petron Corporation. Another issue in that proceeding is whether petitioner Forrest Parrott should be found to be a cause of any order the Commission might enter (R. 26–32).[1]

[1] In the order instituting the proceeding it was alleged that Forrest Parrott was in control of the three corporations and arranged with Raleigh to sell securities of these corporations through the use of nominees in violation of certain of the reg-

Prior thereto, the Commission had filed two separate actions against the petitioners and others to enjoin the alleged unlawful sale and distribution of these securities. A suit relating to the stock of Hydramotive Corporation was instituted in December of 1961 in the United States District Court for the Western District of Oklahoma;[2] the second suit, relating to the stock of Ampet and Petron Corporations, was brought in the United States District Court for the District of Colorado in March of 1962.[3]

The administrative proceeding was convened in Washington, D.C., on August 8, 1962 (R. 306). In the course of the proceeding, at the instance of the Commission's staff, the hearing examiner issued subpoenas to a number of persons, including petitioners, which were returnable in Washington in August and early September 1962 (R. 14, 16, 339, 340, 343). Petitioners and others did not comply; they indicated that they would not appear except pursuant to court order (R. 19–20, 24–25, 347).

The Commission then instituted proceedings to enforce certain of the subpoenas in the District Court for the District of Columbia (R. 3), which transferred

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istration and anti-fraud provisions of the federal securities laws (R. 26–32). Petitioner Donald Parrott was president of petitioner Bond and Share Corporation, registrar for the Hydramotive Corporation (R. 302–303, 352).

[2] *Securities and Exchange Commission* v. *Bond and Share Corporation, et al.*, Civil Action No. 9528 (W.D. Okla.). This action has been tried and is awaiting decision.

[3] *Securities and Exchange Commission* v. *Ampet Corporation, et al.*, Civil Action No. 7480 (D. Colo.). Trial has not yet been had in this action.

the case to the District of Colorado (R. 101).[4] At the hearing before the District of Colorado court on October 8, 1962, counsel for petitioners suggested that the hearings in the Commission administrative proceedings should be held in Denver, Colorado (where petitioners reside), and stated that Raleigh, the primary party in those proceedings, had no objection to the hearing being held there (R. 405, 450). The district court indicated that because of the inconvenience to Denver residents of traveling to Washington, D.C., and in view of Raleigh's non-objection to a hearing in Denver, it would enforce the subpoenas only if the Commission held its hearing there (R. 448–453).

It developed, however, that Raleigh, who resides in a suburb of Baltimore, Maryland, had never consented, and in fact objected, to a transfer of the hearing to Denver (R. 363–364). When the district court on rehearing was informed of this fact, it decided not to order a hearing in Denver. But because of the two pending court actions instituted

[4] When the first persons subpoenaed failed to appear, the Commission instituted an enforcement action against them in the United States District Court for the District of Columbia (R. 3–7). All the subpoenaed persons, including petitioners, then moved in the United States District Court for the District of Colorado to quash the subpoenas (R. 63–64). This motion was denied on the ground that the Colorado court lacked jurisdiction (R. 65–86). The District Court for the District of Columbia thereafter transferred the subpoena enforcement action to the District of Colorado because the Colorado court had already considered the subject matter and because the persons subpoenaed resided in that district (R. 101). Subsequent to the order of the court of appeals in this case, only petitioners have continued to refuse to respond to the subpoenas.

by the Commission against the subpoenaed witnesses (*supra*, p. 3), the district court, although ordering that the subpoenas be "enforced in all respects," provided that the subpoenaed witnesses would not be required to ~~be~~ testify "elsewhere than in Denver for a period of 90 days" (R. 162–207). That order was entered on December 11, 1962 (R. 208–209).

Upon the expiration of the 90-day period, the Commission rescheduled the administrative hearing in Washington and directed the witnesses to appear. However, on petitioners' motion the district court, on March 22, 1963, extended the time for compliance until June 1, 1963, again because of the pending injunction actions (R. 220). On the Commission's motion for rehearing, the district court, on April 24, 1963, reaffirmed its prior rulings, granted petitioners' motion for a further extension to July 25, 1963, and granted leave to the subpoenaed witnesses thereafter "to request further delays for due cause shown" (R. 220, 254).

The Commission appealed from this order to the Court of Appeals for the Tenth Circuit (R. 256). Petitioners did not appeal. The court of appeals remanded the cause "with direction to enforce the subpoenas" (Pet. App. xvi).

ARGUMENT

The decision of the court below in ordering immediate enforcement of the administrative subpoenas was clearly correct, and petitioners present no question warranting review by this Court.

Petitioners' sole contention is that if they were required to testify at the administrative hearing prior to the trials of the injunction actions they would be placed "at a disadvantage at the hands of [the] administrative agency" (Pet. 9). The purported "disadvantage" is that the Commission could obtain in the administrative proceeding information for use in the injunction suits which, it is argued, it should be required to obtain in those actions by following the discovery procedures of the Federal Rules of Civil Procedure.[5]

There is serious doubt whether, in view of petitioners' failure to appeal from the district court's order which enforced the subpoenas (subject to certain conditions), they may now challenge the enforcement directed by the court of appeals. See *United States* v. *American Railway Express Company*, 265 U.S. 425, 435. In any event, petitioners' contention is plainly without substance. The subpoenas were issued in the normal course of an administrative proceeding to obtain evidence for use in that proceeding to determine whether a broker-dealer violated the federal securities laws. There is nothing in the record of the subpoena enforcement proceedings which even suggests that the Commission is using its administrative proceeding as a means of obtaining evidence for the injunction suits. The fact that the injunction suits relate to and involve certain events which are involved in the administrative proceeding

[5] Insofar as petitioners rely upon the action in the United States District Court in Oklahoma, their point is moot. The trial of that action has been completed.

neither limits the Commission's authority to conduct the latter proceeding nor justifies its suspension until the court cases have been decided. Cf. *Bowles* v. *Bay of New York Coal & Supply Corporation*, 152 F. 2d 330 (C.A. 2); *Sutro Brothers & Co.* v. *Securities and Exchange Commission*, 199 F. Supp. 438, 439 (S.D.N.Y.). It is similarly no ground for staying the administrative proceeding that, if anything is there developed which may be pertinent to the injunction suits, the Commission may use it in the court cases.

The administrative proceedings have been stalled for 15 months by the Commission's inability to obtain petitioners' testimony. The court of appeals was plainly correct in refusing to countenance any further delay and in directing immediate enforcement of the subpoenas.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

PHILIP A. LOOMIS, JR.,
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DAVID FERBER,
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JANUARY 1964.

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